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July 27, 2000

Via Telecopy

Thomas A. Cinti, Esquire
(3RC42)
Senior Assistant Regional Counsel
United States Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103

Re: North Penn Area Seven Superfund Site
Prospective Purchaser Agreement
EPA Docket No.: CERC-PPA-2000-0003

Dear Tom:

This firm represents several property owners in the area of the North Penn Area Seven Superfund site in Lansdale borough and Upper Gwynedd Township, Montgomery County, Pennsylvania. Property owners include John Chirico, Lisa Parker, Bonnie and Terry Berry and Kimberly Ernst.

By notice dated June 27, 2000, the Agency advised of a proposed Prospective Purchaser Agreement to be entered into pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). The Prospective Purchaser Agreement ("Agreement") involves the 1180 Church Road facility in the North Penn Seven site ("Site"). The responding parties to the Agreement are Progress Lansdale Development Associates, L.P., Progress Lansdale Development Holdings, L.P., Progress Development I, L.P., NSLAC Acquisitions, L.L.C., 1180 Church Road, Inc., Pennsylvania Real Estate Holdings, Inc. and the Commonwealth of Pennsylvania State Employees Retirement System. Together, the proposed Agreement and the extensive Covenant Not To Sue involves all of these responding parties. They are referred to in the Agreement as "Settling Respondents".

AR001048

My clients are requesting reconsideration of the proposed Agreement on a number of grounds. Additionally, my clients have retained RT Environmental to review known environmental conditions at or near the site. My comments include input received from RT in its review. The proposed prospective Purchaser Agreement presents a significant departure from guidances of the Agency and is without sufficient legal, factual or regulatory support. The reasons for this conclusion are as follows:

I. Site Information

The North Penn Area 7 site is one of a number of North Penn Area Sites which have been impacted by trichloroethene, tetrachloroethene, methylene chloride, carbon tetrachloride and related compounds. Based on information that has been received and is in the public record, there are ten facilities in Area 7 which could have provided impacts to drinking water supplies provided to most of the people living in the area by North Penn Water Authority.

Although the initial focus at the site was operations conducted by Spra-Fin, it became clear during the course of study that other areas contain possible impacts. The property at 1180 Church Road was a former site utilized by Philco-Ford and Zenith for the manufacturing of televisions, including picture tubes. It is reported that activities in manufacturing included the acid washing of picture tubes. Therefore, it appears likely that this property may be one of the larger sources of contamination.

Acid from the acid washing and other materials from industrial activities conducted by Philco-Ford and Zenith were placed on one of ten waste water lagoons at the Church Road site. Of these waste water lagoons, three had no liners, four had asphalt liners and three had rubber liners. There is no indication that the liners were effective in preventing migration from occurring at the seven lagoons at which they were employed. In fact, the lagoons did not utilize anything even approaching current technology.

These lagoons were not closed until the late 1980s. As best as we can determine, there was minimal oversight provided by the Pennsylvania Department of Environmental Protection, and there was no site "closure" obtained from DEP. There was no determination by DEP or EPA that no further action was necessary for closure of lagoons, and it is not appropriate to conclude that the former surface impoundments are of no further environmental concern based on that "closure".

Furthermore, it appears that only minimal investigation was conducted in the "phase one due diligence effort" and "phase two due diligence effort" referred to in the introduction of the Agreement. Also, no Remedial Investigation has been performed at the Church Road site. It is also clear, and follows naturally, that no Feasibility Study or remedial effort has been conducted at the site. Accordingly, there is no available current projection of costs for the RI/FS or the costs and scope of an ultimate remediation at the site.

Nevertheless, EPA is rushing to conclude the settlement with a number of parties. In its rush, the Agency has failed to reach an agreement that would pass the litmus test required by EPA guidances, RCRA and CERCLA in order to be considered to be an appropriate Prospective Purchaser Agreement.

II. Deficiencies of Settlement Under EPA CERCLA Guidance Documents.

EPA has promulgated several guidances on Prospective Purchaser Agreements under CERCLA. In its May 24, 1995 Guidance on Agreements with Prospective Purchasers with Contaminated Property ("1995 Guidance"), the Agency discusses the laudatory purposes behind allowing parties to obtain covenants not to sue for CERCLA liability prior to purchase of Superfund sites. The 1995 Guidance and its progeny also recognize the powerful effect that these settlements can have on the rights of EPA and the public.

As a rule, it is clear under Section 107 of CERCLA that parties who are property owners are liable parties. There is less litigation regarding property owners than any other category of liable parties, due to the fact that it is easy to determine who is the current property owner and liable party.

Therefore, the 1995 Guidance recognizes that certain thresholds must be met before prospective purchasers will be provided with the powerful protection from liability that only the Agency can offer. This Prospective Purchaser Agreement is deficient in a number of areas set forth in the guidances.

I. Each of the seven parties has not been reviewed.

It is not clear that all of the Settling Respondents are prospective purchasers. Pursuant to the 1995 Guidance, the Agency is mandated to determine first that the Agreements are with prospective purchasers who are buying property that is contaminated for clean up, redevelopment or reuse of that property. However, from records reviewed in connection with the

settlement, it does not appear that EPA has made a determination that the following are actual prospective purchasers:

1. Progress Lansdale Development Associates, L.P.
2. Progress Lansdale Development Holdings, L.P.
3. Progressive Development I, L.P.
4. NSLAC Acquisitions, LLC
5. 1180 Church Road, Inc.
6. Pennsylvania Real Estate Holdings, Inc.
7. Commonwealth of Pennsylvania State Employees Retirement System

It is axiomatic that EPA is not in the business of providing Prospective Purchaser Agreements to the parties who are not prospective purchasers. This review is especially important when one recognizes that the 1995 Guidance requires the region to first evaluate "the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a Prospective Purchaser Agreement".

In any event, the EPA must also make an independent determination that each of the seven prospective purchasers of the property has no independent liability aside from a future ownership interest. With regard to partnerships, the determination must include the individual partners. The amounts paid by each entity must also be considered. How else can EPA determine what liability it is settling? There is nothing in the record to reflect that this review has been conducted.

Under the 1995 Guidance, there must also be a demonstration that EPA's Covenant Not to Sue is "essential to remove Superfund liability barriers and allow the private party cleanup in the productive use, reuse or redevelopment of the site". Put quite simply, the Agency is mandated to consider each of the seven partnerships, limited liability companies or entities to determine that each of these has a Superfund liability barrier, that this barrier impairs reuse or redevelopment of the property and that each entity requires EPA's removal of that barrier.

Nothing in the record reflects either that EPA reviewed these issues in connection with this Agreement or that liability creating a barrier exists for each of these seven entities.

2. EPA has not considered other available avenues to alleviate threat of Superfund liability.

EPA's ability to grant a Covenant Not to Sue is both a blessing (in redevelopment of contaminated property) and a burden to the public. The burden to the public is clear when, as in this case, EPA removes seven parties from consideration as possible contributors to remedial

costs, remedial actions or related costs at the site. In essence, these seven private parties will have an EPA sanctioned release from statutory or common law right of others to seek recoveries of costs or remediation. Accordingly, EPA's discretion in issuing Covenants Not to Sue is restrained.

In the 1995 Guidance, EPA is mandated to consider whether "other available avenues (e.g., private indemnification agreements) may exist to sufficiently alleviate the threat of Superfund liability at the site without the need for EPA involvement". There has been no consideration by the Agency of whether there are other alternatives by which each of the Settling Respondents can obtain the necessary assurances that they will not ultimately be held liable for response costs.

This site appears to have been extensively used for disposal of hazardous substances by several financially viable companies, including Philco-Ford and Zenith. These companies provide sources for each or all of Settling Respondents to obtain costs or remediation. Additionally, some or all of the seven entities can contractually agree with each other on responsibility for remediation and/or indemnification. The obvious availability of other recovery avenues is fatal to Settling Respondents request for a Prospective Purchaser Agreement. As is stated in the 1995 Guidance, "Prospective Purchaser Agreements generally will not be appropriate at sites screened out using the criteria (of availability of other avenues to obtain relief from CERCLA liability)".

Therefore, this Prospective Purchaser Agreement is inappropriate and against EPA guidance and policy.

3. It does not appear that EPA has received a "substantial benefit".

Another prerequisite of a Prospective Purchaser Agreement, in fact one referred to in the Agency's 1995 Guidance as a "cornerstone," is that there must be a "substantial direct benefit to EPA". This Prospective Purchase Agreement is notable in that it only provides for the payments of monies. In order to determine whether the payment provides a "substantial" benefit, EPA must consider the total amount of money being paid in light of the total amount of required remediation and the actual and projected remediation and investigation costs which have been or will be incurred at the site.

There is no basis upon which to make a determination that there is a substantial benefit to EPA. In fact, there is no current feasibility study to review potential remediation costs or the remediation of the numerous lagoons on site. There is also insufficient consideration of the presence of hazardous contamination of the type which likely originated from these lagoons.

There is no consideration of any indirect benefits. For example, there is no review of whether or not the projected use of the site would reduce or eliminate the risk of mobility of contaminants at the site or whether the site use will provide expanded community services or community benefits. Consideration of this type is required in the 1995 Guidance. Rather, the proposed project appears to be yet another project in the continuing growth of urban sprawl in this area.

Accordingly, the Agreement should be rejected on this basis alone.

4. There has been no information regarding the potential for aggravation of or contribution to existing contamination from the future use.

Assuming that these seven companies will all be purchasers of the property and be entitled to enter this Agreement, these parties must demonstrate that the reuse of the property will not "aggravate or contribute to the existing contamination or interfere with EPA's response action". 1995 Guidance. Accordingly, "comprehensive information regarding (development) plans should be provided to EPA". (1995 Guidance). EPA then must determine whether the planned activities are "likely to aggravate or contribute to the existing contamination or generate new contamination...". (1995 Guidance).

Based on information obtained in our investigation, it is possible likely that new channels of migration may be opened during the construction of the planned development at the site. Additionally, it appears that, along with increased usage of the site, there may be a potential for introduction of new contamination.

Insufficient information has been made available for two primary reasons. First, there has not been a sufficient detailing of future development and construction plans in order for EPA to determine that contamination will not be impacted. Second, even if a wealth of information were to be provided, EPA has not yet conducted its remedial investigation. Therefore, it is impossible for the Agency to determine whether or not there is an impact which either aggravates or contributes to existing contamination or which generates new contamination. When EPA is not aware of the full extent of the current contamination, it is not possible for the Agency to make the required determination regarding the impact that prospective use of this property will have on that unknown contamination.

5. Adequate consideration has not been provided.

As discussed above, the 1995 Guidance requires EPA "to obtain adequate consideration when entering into a Prospective Purchaser Agreement". This particular Agreement fails for a number of reasons cited in paragraph IV of the 1995 Guidance, some of which are:

a. The 1995 Guidance requires consideration of past and future response costs. EPA must determine the past and projected future response cost expected to be incurred in order to determine how much of its claim is settled. No such determination has been provided at this site.

b. EPA must determine whether there are other potentially responsible parties ("PRPs") who have performed the work or who will reimburse EPA costs. EPA must use this information to determine if there is likely to be a shortfall in recovery of past costs and projected future costs. No evaluation of other PRPs and their availability to pay or perform has been conducted.

c. Not only has there been no consideration of other potentially responsible parties for the yet to be determined costs/response, there has been no consideration as to whether each of the seven Settling Respondents, their partners, affiliates and subsidiaries may actually be potentially responsible parties. The role of each of the seven at the site must be reviewed. Additionally, in this case, unlike the normal Prospective Purchaser Agreement, partnerships and limited liability companies are involved. There has been no review of the individual partners in the partnerships and their potential liability.

d. We have no information as to how much each of the Settling Respondents are paying. In the same way that liability is company specific, payments must be as well. Nothing in the record reveals each company's portion of payment. We can not tell, for example, if the Pennsylvania State Employees Retirement System is making any payment at all, let alone whether it is providing adequate consideration for its release of liability.

e. Paragraph IV requires that EPA consider not only the amount it is receiving, but also "the purchase price to be paid by the prospective purchaser, the market value of the property, the value of any lien on the property pursuant to 107(a) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property and if so the likely increase of the value of the property attributable to the clean up". The purposes behind this review include a need to determine to whether or not the Settling Respondents will obtain a windfall profit by eliminating exposure to government costs. EPA should have considered the fact that the designation of the site as a Superfund site led to a significant decrease in the purchase price to the Settling Respondents. In fact, although the \$225,000.00 settlement amount appears, on its face, to be a significant sum of money, when coupled with a reduction in the market price, the Settling Respondents will obtain one of the most advantageous real estate deals in this region. .

III. There is no authority for providing a Covenant Not to Sue with respect to the Resource Conservation and Recovery Act.

Remarkably, and in this author's experience for the first time, EPA has determined that it will include, in its Covenant Not to Sue, liability which may arise pursuant to the Resource Conservation and Recovery Act ("RCRA"). Section VIII provides that the United States will not sue pursuant to Section 7003 of the RCRA. Not surprisingly, this provision is absent from the form of agreement provided by the Agency to its regions for use in Prospective Purchaser Agreements.

There is no statutory authority in RCRA for EPA's grant of Prospective Purchaser RCRA liability protection. There is no guidance to assist EPA in determining when to enter into an RCRA Prospective Purchaser Agreement because it is not possible.

It is precisely for this reason that RCRA liability protection has not been provided in past Prospective Purchaser Agreements. The proposed grant in this Agreement creates a dangerous precedent which may be used by other parties and which exceeds EPA's legal authority.

IV. The restrictions imposed by the contribution protection provision in the Agreement unreasonably impact many others.

The undersigned has represented other clients in North Penn Area Superfund sites. Included in my representations are several land owners and potentially responsible parties. These parties are being asked to pay for study costs and remediation which extend well beyond the physical boundaries of properties.

One must assume that, as is the normal case with Superfund litigation, remediation of this property will occur. Parties who are not on site will be asked to pay for that remediation. In essence, these parties will be paying monies for which they will receive no benefit as they do not have any ownership interest enhanced by a remediation. However, the Settling Respondents will see a greatly enhanced value in their property both by remediation and by entering into this Agreement. This enhanced value, due to investigation and remediation, comes on the shoulders of parties who do not gain from the economic benefit which arises when a site is cleaned up and removed from Superfund consideration.

Depriving parties of their common law and statutory rights pursuant to contribution protection provisions of the Agreement is tantamount to allowing Settling Respondents to obtain the financial benefit of enhanced value, even though no consideration is paid. This constitutes a

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fundamental due process violation. Accordingly, the 1995 Guidance and the fair consideration of the Agency must be employed. That consideration is utterly missing in this Agreement.

Given the importance of this Agreement, the undersigned requests an additional thirty days within which to supplement this submission. Additionally, we request that a public meeting be held pursuant to provisions of RCRA, 42 U.S.C. 6973(d). I also assume that public notice in the Federal Register will be provided of the RCRA settlement portions. Please provide me with notice both of the public meeting and the publication. I greatly appreciate your consideration of the attached.

Very truly yours,

Philip L. Hinerman

PLH/dlb

cc: Gary Brown, RT Environmental